E COPY

Office Supreme Court, U
FILED
DEC 16 1964
JOHN F. DAVIS, CLERK

No. 691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF RAILROAD TRAINMEN, AFL-CIO,
Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM B. DEVANEY
GEORGE B. MICKUM, III
1100 Shoreham Building
Washington, D. C. 20[illegible]
Attorneys for Respondent

Of Counsel:

STEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Opinions Below 1-2

Jurisdiction 2

Questions Presented 2-3

Statutes Involved 3

Statement of Case 3-7

Argument and Reasons for Denial of the Writ 7-18

(1) The Decision in the Court of Appeals Does Not Involve an Important Unsettled Question of Federal Law 7-11

(2) The Decision of the Court of Appeals That, in the Future, Where Reasonably Necessary to Continue Operations, Respondent May Under Court Supervison Alter Employment Conditions Raises Only a Hypothetical Question and is Clearly Correct 11-16

(3) The Decision of the Court of Appeals is Not in Conflict With the Decision of Any Other Court of Appeals 16-18

Conclusion 18

Certificate of Service 20

TABLE OF CITATIONS

CASES:

California v. *San Pablo & Tulare R.R.*, 149 U.S. 308 (1893) 13

Elgin, Joliet & Eastern R. Co. v. *Burley*, 325 U.S. 711 (1945) 15

Flight Engineers Int. Ass'n, EAL Chap. v. *Eastern Air Lines*, 208 F. Supp. 182 (S.D. N.Y. 1962), *affirmed*, 307 F. 2d 510 (2d Cir. 1962), *cert. den.* 372 U.S. 945 (1963) 10, 14

Locomotive Engineers v. *B. & O. R. Co.*, 372 U.S. 284 (1963) 2, 4, 7, 8, 13, 15, 16

Page

Monon R. R. v. *Brotherhood of Railroad Trainmen*, 215 F. Supp. 430 (N.D. Ill. 1963) 10
NLRB v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) 13
NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 (1963) ... 13
Order of Railway Conductors v. *L. & N. R. R.*, 331 F 2d 368 (5th Cir. 1964) 10
Pan Am World Airways v. *Flight Engineers*, 306 F. 2d 840 (2d Cir. 1962) 10
Pullman Company v. *Order of Railway Conductors*, 316 F. 2d 556 (7th Cir. 1963) 10
Terminal Assoc. v. *Trainmen*, 318 U.S. 1 (1943) 15
United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 13
United States v. *Florida East Coast Railway*, ... F. Supp. ..., 55 LRRM 2798 (M.D. Fla. 1963) 9
United States v. *Florida East Coast Railway*, 221 F. Supp. 325 (D.D.C. 1963) 9
United States v. *Alaska S.S. Co.*, 253 U.S. 113 (1920).. 13
Wooten v. *Ohler*, 303 F. 2d 759 (5th Cir. 1962) 17,18

STATUTES:

Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (47 Stat. 70, *et seq.*) 2
Railway Labor Act (45 U.S.C. § 151, *et seq.* 44 Stat. 577, *et seq.*) 3, 15, 16
P.L. 88-108 (77 Stat. 192) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 691

BROTHERHOOD OF RAILROAD TRAINMEN, AFL-CIO,
Petitioner,

v.

FLORIDA EAST COAST RAILWAY COMPANY,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 336 F. 2d 172 and is appended to the Petition herein as Appendix A (hereinafter referred to as Ptn. App. A). The judgment of the Court of Appeals is appended to the Petition herein as Appendix B. The Findings of Fact and Conclusions of Law of the United States District Court for the Middle District

of Florida are printed in the Joint Appendix used in the Court below, pages 13-19, and the preliminary injunction which was appealed by Respondent to the Court of Appeals appears at pages 19-20 of the Joint Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, page 2.

QUESTIONS PRESENTED*

1. Whether in the circumstances of this case a railroad which served the November 2, 1959, notices involved in *Locomotive Engineers* v. *B. & O. R. Co.*, 372 U.S. 284 (1963), where the dispute involving those notices was wholly unresolved, was entitled to place rules embodied in such notices into effect as to Petitioner on February 25, 1964 after all the procedures of the Railway Labor Act had been exhausted and after the suspension of said rules changes required by Public Law 88-108 had expired.

2. Whether the decision by the Court below, that in the future a railroad attempting to operate under strike conditions might, where reasonably necessary

---

* In the event a writ of certiorari is granted, Respondent reserves the right to argue as it did in the Court below that under the conditions existing it was justified in operating under the working conditions it utilized, that it was not bound by any agreement with the Petitioner or by any requirements of Section 6 of the Railway Labor Act inasmuch as Petitioner refused to supply manpower with which to operate and Respondent had been compelled to cease operations, that any complaint that the agreement with Petitioner is not being complied with is within the exclusive jurisdiction of the National Railroad Adjustment Board, and that Petitioner's action in the District Court was barred by the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.* (47 Stat. 70 *et seq.*).

to the continuance of operations and under the supervision of the courts, temporarily alter the rules governing work conditions embodied in agreements with the Petitioner, should be reviewed where no such changes have been approved by the Courts below or are before this Court.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (45 U.S.C. § 151, *et seq.* 44 Stat. 577, *et seq.*) and P.L. 88-108 (77 Stat. 129) are set forth in the Petition, pages 4-7, and Appendices C and D.

STATEMENT OF CASE

The Court is respectfully referred to the chronology of events leading up to the decision of the Court below contained in the Opinion (336 F. 2d 172 at pp. 175-78; Ptn. App. A, pp. 2-10). The statement of the case in the Petition is not in accordance with these facts and, accordingly, is defective. The relevant facts upon which this case must be judged are summarized as follows:

1. Florida East Coast Railway Company (hereinafter FEC or Respondent), along with other Class I carriers in the United States, on November 2, 1959 issued notices pursuant to Section 6 of the Railway Labor Act to its operating organizations including the Brotherhood of Railroad Trainmen (hereinafter BRT or Petitioner), the Petitioner herein. These notices (R. 68-71)[1] and the accompanying proposals modify the 1949 Collective Bargaining Agreement between BRT and FEC.

---

[1] "R" references are to the printed Joint Appendix, used in the Court below, nine copies of which have been filed with this Court.

2. While litigation in respect to the November 2, 1959 rules changes was in progress in *Locomotive Engineers* v. *B. & O. R. Co., supra* (and before the changes could properly be put into effect) eleven labor organizations representing non-operating employees of FEC struck on January 23, 1963 over a wage demand as to which the procedures of the Railway Labor Act had been exhausted. Although the BRT did not formally go out on strike at that time, its members honored the striking unions' picket lines and did not report for work. Consequently, FEC ceased operations.

3. Shortly thereafter, on February 3, 1963, FEC resumed operations utilizing supervisory personnel and later replacement workers, and in the circumstances of the strike, conditions of employment of these personnel necessarily differed from those set forth in pre-existing agreements between FEC and its labor organizations, specifically conditions provided in the 1949 Collective Bargaining Agreement with BRT.

4. Following the decision of this Court in *Locomotive Engineers* v. *B. & O. R. Co., supra,* in which this Court held, *inter alia,* that all statutory procedures in relation to the November 2, 1959 notices had been exhausted and that the carriers placing the rules changes into effect would not violate the Railway Labor Act by doing so, subject only to the invocation of a Section 10 Emergency Board, and following the expiration of P.L. 88-108, which had prohibited making certain of the November 2, 1959 rules changes effective, FEC on February 24, 1964 issued a notice which placed the November 2, 1959 rules into effect as of February 25, 1964 (R. 98-9) with certain exceptions as to which there is no controversy material here.

5. On the same day (R. 2-10), BRT sought an injunction against FEC making any changes in the rates of pay, rules, working conditions, etc. prescribed by the 1949 Agreement. The injunction as formalized on March 2, 1964 (R. 19-20) restrained FEC from operating under any terms except those embodied in the 1949 Agreement between FEC and BRT, thus precluding FEC from placing into effect the November 2, 1959 rules changes. The injunction was stayed on March 17, 1964 by the Court of Appeals and this stay was continued in effect pending the District Court's consideration of the nature and scope of the orders to be issued consistent with the Court's Opinion. Under the stay by the Court of Appeals of the District Court's injunction, the November 2, 1959 rules remained fully effective and FEC has operated under them since they went into effect.

6. The Court of Appeals held: (a) that the District Court had erroneously restrained FEC from placing the November 2, 1959 rules into effect and (b) that if *in the future*, by reason of strike conditions continuing to exist it was necessary to alter such rules in order to implement the undisputed right of FEC to continue to operate, this might be done under the direct and continuing supervision of the court.

BRT has completely clouded the issue in this case by insisting that the November 2, 1959 rules "were never put into actual effect or operation" (Ptn. p. 12) and by implying that the Court below sanctioned FEC's prior operation under rates of pay, rules and working conditions allegedly unilaterally imposed by FEC without compliance with the Railway Labor Act. Petitioner's questions presented are based entirely on

these assumptions. But these questions simply are not presented in this litigation.

The issue before the Courts below and before this Court is not whether the FEC acted erroneously at some time prior to the decision of the Court of Appeals. Rather, *the issue is whether FEC was entitled to place into effect and operate under the November 2, 1959 rules.* This was what BRT sought to enjoin when FEC, upon the expiration of P.L. 88-108, gave notice that the 1959 rules were being put into effect.

The Court of Appeals held that FEC was required to operate under the 1949 Agreement with BRT, except that it was entitled to place the 1959 rules changes into effect on February 25, 1964, as it did, and that FEC could not unilaterally impose different rules than those contained in the 1949 Agreement, as amended by the 1959 rules changes, without exhausting the Railway Labor Act procedures. The Court held, and this is clearly the fact, that nothing FEC had done, including the issuance of a notice on September 25, 1963 embodying certain of the conditions of employment established during FEC's "self help" period of operations, superseded the prior November 2, 1959 notice and that, in accordance with the terms of the notice of February 24, 1964 by which the 1959 rules changes were made effective (R. 98-9), negotiations concerning the September 25, 1963 proposals must continue.[2] Thus, FEC was held not entitled to place into effect, without first exhausting Railway Labor Act procedures, rules changes contained in FEC's notices of

[2] The February 24, 1964 Notice stated that the placing of the 1959 rules changes into effect ". . . in no way changes or modifies the Section 6 Notice of September 25, 1963, with respect to which negotiations are still proceeding with your Organization." (R. 99).

July 31, 1963 and September 25, 1963 relating respectively to the abolition of the union shop and the adoption of certain conditions of employment. Although it has reserved its position herein, FEC has not contested the decision of the Court below and is complying with it.

This is not a suit for damages or for criminal violation of the Railway Labor Act. Petitioner's repeated charges that FEC acted improperly during the period from February 3, 1963 to the determination of this suit by the Courts below must therefore be relegated to the category of smear tactics, for these charges have no bearing whatsoever upon the issue presented.

ARGUMENT AND REASONS FOR DENIAL OF THE WRIT

The Petition for Writ of Certiorari should be denied in this case.

(1) The Decision in the Court of Appeals Does Not Involve An Important Unsettled Question of Federal Law

The basic holding of the Court of Appeals that the 1959 rules were properly placed into effect by Respondent is clearly correct and involves only the application of *Locomotive Engineers* v. *B. & O. R. Co., supra,* to the facts of the instant case. This Court held there that all statutory procedures in relation to the November 2, 1959 notices had been exhausted and that placing the rules changes into effect would not violate the Railway Labor Act. Carriers were free to resort to self-help in adjusting the dispute over the 1959 rules. BRT sought in the District Court to enjoin FEC from placing the 1959 rules into effect and the Court below in denying this relief, simply applied this Court's ruling in the *Locomotive Engineers* case.

BRT seeks to avoid the impact of this Court's decision in the *Locomotive Engineers* case by arguing at length (Ptn. pp. 15-20) that the Court of Appeals decided an important unsettled question of Federal law, to-wit, the question whether a railroad, when faced with strike conditions, may adopt changes in rates of pay, rules and working conditions necessary to its right to operate under such conditions. The crucial determination of the Court of Appeals, however, was the holding that FEC had properly placed into effect the rules changes contained in its November 2, 1959 Notice and that "The FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959 notice . . . . ." (Ptn. App. A, p. 19).

Whether or not past actions of FEC prior to February 25, 1964, by way of accommodation to emergency strike conditions were or were not justified under the Railway Labor Act is irrelevant, if the Court of Appeals was correct in its determination of the rules under which FEC may operate henceforth—the 1959 rules. FEC's placing the 1959 rules into effect upon the expiration of P.L. 88-108 was clearly sanctioned by this Court in *Locomotive Engineers* v. *B. & O. R. Co., supra.* The statement by Petitioner that

> ". . . the November 2, 1959 Notice proposals were never put into actual effect or operation. And the rates of pay, rules and working conditions actually in effect are the same as those 'proposed' in the September 25, 1963 Notice . . . ." (Ptn. p. 12)

is untrue. FEC placed the 1959 rules into *actual operation* on the railroad on February 25, 1964 (R. 98-9, 137, 142-44, 184). Petitioner's mis-statement of the

"conditions actually in effect" (for which there is no Record support) should not be allowed to obscure the fact that the Court of Appeals permitted FEC to operate under the 1959 rules and *that is actually what FEC has been doing since shortly after February 25, 1964.*

Indisputably, FEC could not have placed the 1959 rules into effect before it did. As the facts set forth in the opinion below clearly demonstrate, except for the period July 10, 1963 to August 28, 1963 (during which the 1959 rules were placed into effect by FEC),[3] FEC was legally precluded from placing them into effect prior to February 25, 1964. BRT's repeated assertion that the 1959 rules were never placed in actual operation is accordingly inaccurate.

Next, Petitioner seeks to avoid the controlling significance of *Locomotive Engineers* v. *B. & O. R. Co.,* (Ptn. pp. 22-4) by attempting to show that FEC "superseded" the November 2, 1959 Notice or forfeited the right to place it into effect by issuing a different Section 6 Notice on September 25, 1963, or that somehow FEC "waived" its right to put into effect its 1959 rules by not complying with injunctions issued in other cases. *United States* v. *Florida East Coast Railway,* 221 F. Supp. 325 (D.D.C. 1963) and *United States* v. *Florida East Coast Railway,* — F. Supp. —, 55 LRRM 2798 (M.D. Fla. 1963).

The November 2, 1959 Notice was not "superseded" because, as the Court of Appeals found as a matter of

---

[3] During this period FEC could not actually operate completely under the 1959 rules since as the Court below noted (Ptn. App. A, p. 6), "the BRT was still refusing to cross the picket lines" and FEC was forced to operate almost wholly with supervisory personnel.

fact (see n. 2 *supra*), it was not intended to be superseded by the September 25, 1963 Notice.

> "The parties bargained about each of the notices separately, though both were simultaneously pending for a period of time. Furthermore, it is apparent that the Carriers and Organizations as a matter of practice treat each notice independently. . . . The November 2, 1959, notice was not superseded by the September 25, 1963, notice." (Ptn. App. A, p. 19)

It is established law that where the procedures of the Act have been exhausted with regard to one Section 6 Notice, the giving of a new Section 6 Notice will not prevent the putting into effect of the rules changes handled to a conclusion under the Act. *Monon R. R.* v. *Brotherhood of Railroad Trainmen,* 215 F. Supp. 430 (N. D. Ill. 1963); *Pullman Company* v. *Order of Railway Conductors,* 316 F. 2d 556 (7th Cir. 1963); *Order of Railway Conductors* v. *L. & N. R. R.,* 331 F. 2d 368 (5th Cir. 1964); *Pan Am World Airways* v. *Flight Engineers,* 306 F. 2d 840 (2nd Cir. 1962); *Flight Engineers Int. Ass'n, EAL Chap* v. *Eastern Air Lines,* 208 F. Supp. 182, 189-91 (S.D.N.Y. 1962), *affirmed,* 307 F. 2d 510 (2d Cir. 1962), *cert. den.,* 372 U.S. 945 (1963).

The contention of waiver or forfeiture based on FEC's alleged non-compliance with injunctions is totally specious, so much so that the Court of Appeals did not ever consider it worthy of mention. Neither District Court case cited by Petitioner involved FEC's right to place the 1959 rules into effect following the expiration of P.L. 88-108. The first injunction, issued by the District Court in the District of Columbia, merely involved the requirement that FEC defer placing into effect the 1959 rules until thirty days after the

rendition of the report of the Emergency Board 154. FEC fully complied with that injunction, withdrawing the 1959 rules which it had sought to place into effect. The second case merely involved the question whether an attempt by FEC to place certain rules changes into effect as to three operating unions other than BRT was barred by the provisions of P.L. 88-108. The Court held that some of the changes were barred, others were not, and FEC complied fully with the terms of the injunction.

Petitioner urges that these injunctions required FEC to go back to operation under the 1949 Collective Bargaining Agreement. As a reading of both opinions will demonstrate, this is erroneous. In neither instance did the Court require FEC to change its manner of operations *under strike conditions*. And, even if those injunctions had imposed such a requirement during some prior period (which they did not), such a requirement would be immaterial following the expiration of P.L. 88-108—the time at issue here. Finally, the United States, which sought and obtained the two injunctions referred to, never brought contempt proceedings against FEC, nor so far as FEC is aware were such proceedings ever contemplated inasmuch as FEC obeyed the injunctions to the letter.

(2) The Decision of the Court of Appeals That, in the Future, Where Reasonably Necessary to Continue Operations, Respondent May Under Court Supervision Alter Employment Conditions Raises Only a Hypothetical Question and Is Clearly Correct

As has been pointed out, this facet of the Court of Appeals holding is *not* an approval of FEC's past practices but an allowance for future contingencies only. The Court below clearly required FEC to op-

erate only under the 1949 Agreement as amended by the 1959 rules changes if possible—and this is being done now. In recognition of the undisputed right of FEC to try to remain in operation—to resort to self-help as this Court has phrased it—the Court of Appeals merely pointed out that certain adjustments in working conditions as prescribed in the 1949 and 1959 rules *might* be required in order to meet emergency conditions. This was conceded by Petitioner in the Court below:

> ". . . Indeed, the BRT has recognized that where, for example, sufficient crews are not available to maintain the contract structure forbidding road crews from operating trains through terminals, this requirement need not be met. They also concede that supervisory personnel may be used and that as respects the Union Shop agreement, it is not a violation of the agreement or of the Railway Labor Act for FEC to hire and pay non-union replacements. As a corollary, BRT concedes that FEC has no obligation to fire any such replacement at least until union membership has been declined by him." (Ptn. App. p. 17)

It is, of course, possible that BRT or other labor organizations *might* sometime in the future succeed in depriving FEC of all employees, and that the Railroad *might* then find it necessary again to adopt emergency procedures to enable it to operate under these conditions. But it is apparent that these are possibilities, not the actual situation before the Court. Thus, the attempt to secure review of this feature of the Court of Appeals holding raises at best an hypothetical question on which at the present time there is no record at all upon which this Court could make any determination. Moreover, as FEC is now operating

strictly under the 1959 rules, questions based upon prior conduct at variance with those rules are moot.[4]

Apart from the moot or hypothetical, *in futuro* nature of the questions sought to be presented in this regard, it is abundantly clear that no substantial, important or novel question is presented. On the merits, the Court of Appeals was clearly correct in holding that FEC is

> ". . . free to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under strike conditions." (Ptn. App. A, pp. 19-20)

This holding by the Court of Appeals, in spite of the protestations of Petitioner to the contrary, is neither novel nor startling. It follows logically from this Court's decision in *Locomotive Engineers* v. *B. & O. R. Co., supra,* which held that when all procedures under the Act have been exhausted the parties are free to resort to self-help, and from this Court's decisions in such cases as *NLRB* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938) and *NLRB* v. *Erie Resistor Corp.,* 373 U.S. 221 (1963), holding that a corollary of the right to strike in a system lacking compulsory arbitration is management's "right to operate, or at least the right to try to operate." (Ptn. App., A, p.

---

[4] See *California* v. *San Pablo & Tulare R.R.,* 149 U.S. 308, 314 (1893), where a cause of action was extinguished by offer to pay sums due. Justice Gray said: " . . the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue before it." See also, *United States* v. *Alaska S.S. Co.,* 253 U.S. 113 (1920); *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947).

16). Any conclusion other than that reached by the Court below would make a mockery of this right. See *Flight Engineers Int. Ass'n, EAL Chap.* v. *Eastern Air Lines, supra.*

Petitioner counters with the argument (not made in the Court below) that because the Railway Labor Act provides criminal penalties for violations of its provisions, the Court of Appeals' decision incorrectly permits violations of a criminal statute on the basis of economic necessity (Ptn. pp. 18-20). This argument is a non sequitur, for the criminal sanctions provided by the Railway Labor Act are entirely irrelevant to the instant case. No prosecution for criminal violations of the Act has been brought against FEC at any time by the United States. Petitioner seeks an injunction, not conviction of the Railroad under the criminal sanctions provided by the statute.

If the Court of Appeals is wrong in holding that a railroad faced with strike conditions has a right to operate even if deprived of a labor supply sufficient to permit adherence to pre-existing labor agreements, then there will be no corollary to the right to strike. Or rather, the corollary to labor's right to strike will be management's duty to go out of business. To state the proposition is to refute it. As the Court of Appeals correctly pointed out,

> ". . . the unquestioned right to resort to self-help is the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration." (Ptn. App. A, p. 15)

The Petitioner contends, in effect, that before a railroad is entitled to meet an emergency cessation of operations and to effectuate its undisputed right to try to operate it must, with respect to each proposed

temporary change necessitated by strike conditions, give notice, bargain and otherwise exhaust the procedures under the Railway Labor Act. Obviously a labor organization will never agree with the emergency conditions instituted by a railroad under strike conditions. Nevertheless under Petitioner's theory, a railroad out of operation must go through all of the Railway Labor Act procedures, including mediation, seeking the consent to emergency working conditions of the very people who created the emergency by refusing to work in the first place! All will agree that in the circumstances actually existing in this case, such a course of action would not only have been futile but absurd. The Railway Labor Act was not designed to meet or intended to cover the situation involved in such a case as this, where operations had ceased. In contrast, the Railway Labor Act and its procedures are designed to maintain continuance of operations and of work while disputes are being negotiated and mediated. *Locomotive Engineers* v. *B. & O. R. Co.*, *supra*, 372 U.S. at 289-90; *Terminal Assoc.* v. *Trainmen*, 318 U.S. 1, 6-7 (1943); *Elgin, Joliet & Eastern R. Co.* v. *Burley*, 325 U.S. 711, 723-28, (1945).

Consequently, it is wholly inaccurate to accuse the Court of Appeals of having written an exception into the Railway Labor Act. What the Court of Appeals did was to resolve judicially a situation in which the Railway Labor Act is inapplicable and in which its procedures could never be successfully invoked.

Section 2, First, of the Railway Labor Act (45 U.S.C. § 152, First) sets forth the purpose of the Act as being

> "... to avoid any interruption to commerce or to the operation of any carrier growing out of any

> dispute between the carriers and the employees thereof."

All of the procedures specified by the Act are dedicated to keeping carriers in operation while disputes are being negotiated and mediated. As this Court said in *Locomotive Engineers* v. *B. & O. R. Co., supra,* 372 U.S. at 290,

> "'. . . The federal interest that is fostered [by the Act] is to see that disagreement about conditions does not reach the point of interfering with interstate commerce'"

The provisions of the Railway Labor Act are designed for this purpose and do not in any way specify procedures to be followed where a railroad faced with strike conditions has ceased to operate. No provision of the Railway Labor Act can be found which even hints at procedures applicable once a strike has brought a railroad to the point at which it must adopt emergency rules or else go out of business. Shy of a statutory requirement of compulsory arbitration, there is no rational approach to this problem other than that taken by the Court of Appeals.

(3) The Decision of the Court of Appeals Is Not in Conflict With the Decision of Any Other Court of Appeals

There is admittedly no conflict between decisions of the Courts of Appeals in respect to the holdings of the Court below that FEC was free to operate under the 1959 rules, and that the railroad might apply to the Court for permission to adopt employment measures necessary to effectuate its right to operate under strike conditions. Petitioner therefore attempts to manufacture a conflict among the Circuits on the issue of

the proper scope of review by Courts of Appeals of preliminary injunctions issued by District Courts (Ptn. pp. 20-22). The point is not well taken.

Petitioner concedes as it must (Ptn. p. 20) "... that in labor controversies, preliminary injunctions have a way of cutting to the merits and ending the entire controversy." So also here, the so-called "preliminary injunction" (R. 19) definitively determined FEC's and BRT's mutual rights and duties in respect to placing the 1959 and other rules into effect. The District Court found, *inter alia,* that FEC

> "... has not exhausted all the procedures under the Railway Labor Act for making a change in the status quo, and is not entitled to institute the changes proposed in ... the November 2, 1959 Notice ...." (R. 18)

This injunction was granted following a full hearing (R. 13-14, 111-218) going into all of the substantial issues raised by the complaint and FEC's Motion for Reconsideration or Modification and Motion for Stay (R. 20-24) was also argued fully (R. 219-269). These facts completely distinguish this case from all those which Petitioner cites as being in conflict with the action of the Court of Appeals here. Petitioner has not suggested that further proceedings would have or could have been had, nor that further evidence would have or could have altered the legal and factual situation which was completely presented to the District Court. As the Court pointed out in *Wooten* v. *Ohler,* 303 F. 2d 759 at 762 (5th Cir. 1962), cited by Petitioner,

> "... several contentions advanced are of such a nature that if they are demonstrated now to be

> correct to a substantial certainty, there would be no point in a trial on the final merits since no likely trial developments could overcome them."

The situation in the instant case simply does not admit of the necessity of further hearings nor is there any basis whatever for supposing that the normal rule of restricted review has any application to this case.

Petitioner seeks this Court's intervention in the solution of "this unending, tragic labor controversy" (Ptn. p. 24). Stripped of its verbiage Petitioner's rhetoric merely signifies dissatisfaction with the determination of the Court below concerning future relations of the parties pending final settlement of the dispute between them. It cannot be forgotten that it was the Petitioner who refused to supply *on any terms* manpower essential to FEC's maintenance of operations, and that both human tragedy and grave economic losses to the shippers of Florida stemmed from the unions' attempts to keep FEC from operating. The charge that Respondent acted in defiance of the law in its efforts to stay in operation (Ptn. p. 24) seems ill considered in the light of the public knowledge that FEC trains were bombed, workers injured and attacked and their property damaged—all in flagrant violation of the law—by members of the Petitioner and other unions in their efforts to prevent FEC from operating (R. 43-44, 139, 199). While the solution of the Court below was not wholly acceptable to either party it was a solution which attempted to reconcile and harmonize the positions of both and which in fact has stabilized the situation. Accordingly, this Court's intervention now would be neither wise nor desirable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari be denied.

WILLIAM B. DEVANEY
GEORGE B. MICKUM, III
1100 Shoreham Building
Washington, D. C. 20005
Attorneys for Respondent

Of Counsel:

STEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

December 16, 1964

Certificate of Service

I hereby certify that a true copy of the foregoing Brief for Respondent in Opposition was served this 16 day of November, 1964, upon Neal Rutledge. Esquire, and Allan Milledge, Esquire, 601 Flagler Federal Building, 111 N. E. First Street, Miami, Florida 33132, by depositing a copy of same addressed to each in the United States mail with sufficient air mail postage, prepaid.

GEORGE B. MICKUM, III